167-703

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 309.

PETER MENOTTI, PLAINTIFF IN ERROR,

vs.

KATE MAY DILLON AND MARY IVES CROCKER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED JULY 31, 1895.

(15,973.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 6, 1896.

1 (Copy.)

In the Supreme Court of the State of California.

CHARLES McLAUGHLIN, Appellant,
vs.
PETER MENOTTI, Respondent. } No. 15299.

Transcript on Appeal.

A. L. Rhodes, attorney for appellants.
Jackson Hatch, attorney for respondent.

Filed this 11th day of Feb'y, 1893.

L. H. BROWN, *Clerk,*
By GEO. A. McCALVY,
Deputy Clerk.

2 & 3 In the Supreme Court of the State of California.

Complaint.

In the District Court of the Third Judicial District of the State of California in and for the City and County of San Francisco.

CHARLES McLAUGHLIN, Plaintiff,
vs.
PETER MENOTTI, Defendant.

The plaintiff alleges that on the twenty-third day of April, A. D. 1873, he became the owner in fee-simple, and entitled to the possession of the south half of section twenty-one, in township seven
4 south, of range three west, of the Mount Diablo base and meridian, according to the United States survey; that from that time to this he has continued to be, and is now so the owner, and entitled to the possession of the said land; that afterwards, on the twenty-third day of April, A. D. 1873, the defendant entered into possession of the said land, and ousted and ejected the plaintiff therefrom, and from that time to this has continued to hold the possession thereof from the plaintiff, to his damage one thousand dollars.

And the plaintiff further alleges, that the value of the rents, issues and profits of the said land is one thousand dollars.

Wherefore, plaintiff prays for judgment for the possession of said land, and for one thousand dollars, and costs of suit.

TULLY R. WISE,
Attorney for Plaintiff.

(Endorsed:) Filed January 4th, 1875. Wm. Harney, clerk, by Colin M. Boyd, deputy clerk.

Answer.

(Title of Court and Cause.)

Now comes the above-named defendant, and for answer to
5 the complaint filed herein, denies each and every allegation in said complaint contained.

Wherefore, said defendant prays to be hence dismissed with his costs.

J. M. WOOD,
Attorney for Defendant.

(Endorsed:) Received copy this 14th day of October, 1875. Tully R. Wise, plaintiff's attorney. Filed October 14th, 1875. Wm. Harney, clerk, by Colin M. Boyd, deputy clerk.

(Title of Court and Cause.)

Findings of Fact and Conclusions of Law.

I.

From the agreed statement of facts and from the evidence introduced at the trial, the court finds:

That on October 31st, 1864, the Central Pacific Railroad Company of California made and executed an assignment to the West-
6 ern Pacific Railroad Company of its right to construct the portion of its railroad from the city of San José to the city of Sacramento, and of its right accruing to it by virtue of the act of Congress of July 1st, 1862, and July 2d, 1864, including its rights to the land in controversy in this action, and that such assignment was ratified by Congress, on March 3d, 1865.

II.

That on the eighth day of December, 1864, the said Western Pacific Railroad Company filed a map in the office of the Secretary of the Interior of the United States, designating the general route of its road; a copy of which map was received at the United States land office at San Francisco on the thirtieth day of January, 1865, accompanied with a proper order from the Secretary of the Interior to the register and receiver of said office, reserving from pre-emption, private entry and sale the odd-numbered sections of land within twenty-five miles on either side of said line of the general route of said road, for the benefit of said Western Pacific Railroad Company. From said last-mentioned day said reservation was in force. That on February 20th, 1870, said Central Pacific Railroad Company filed in the Department of the Interior the map of the definite
7 location of its railroad between San José and Sacramento, but the said railroad had been completed about the first day of September, 1866, between San José and Niles, the portion thereof which is opposite the land in controversy.

III.

That on June 22d, 1870, the aforesaid two railroad companies consolidated and amalgamated under the name of the Central Pacific Railroad Company.

IV.

That the official map of the said township 7 south, range 3 west, Mount Diablo base and meridian, was filed by the United States surveyor general for California in the United States land office at San Francisco, on February 27th, 1865.

That prior to said last-named date, a survey was, in fact, made by a deputy United States surveyor for California, of a portion of said township 7, which portion embraced the land in controversy in this action; which said survey was made early in the month of June, 1864, to wit: on or about the tenth day of that month; but such survey was not made by authority of the United States Government.

That no actual survey of any portion of said township 7
8 had ever been made before June, 1864, and that no attempt had, up to that time, been made, by any person, or by the Government, to have the boundaries of said township 7 ascertained, or the lines of the sections in said township run.

V.

That the land in controversy in this action is within twenty miles from the line of definite location, and within twenty-five miles from the line of the general route of said railroad, so designated as aforesaid, but not within ten miles therefrom.

VI.

That on the third day of April, 1872, the United States duly executed and delivered to the Central Pacific Railroad Company a patent of said land in controversy, with other lands.

That said patent was in the usual form of said patents issued under said Pacific Railroad acts.

VII.

That on the 3d day of April, 1873, said Central Pacific Railroad Company executed to said Charles McLaughlin a deed, which was sufficient in form and substance to convey to him all the right, title and interest in or to said land in controversy, which the said company acquired by virtue of said acts of Congress and said patent.

9 VIII.

That after the commencement of this action, on, to wit: the 13th day of December, 1883, said Chas. McLaughlin died at said city and county.

That thereafter, by order of said court duly given, made and entered, the last will of said Chas. McLaughlin, deceased, was ad-

mitted to probate, and Kate D. McLaughlin was duly appointed as the executrix thereof.

That thereafter she was duly substituted as the plaintiff in said action.

That thereafter the estate of Charles McLaughlin, deceased, was finally settled in and by said court, and by the order and decree of said court duly given, made and entered, all of the assets and property of said estate, including all his right, title and interest in or to said lands, and the cause of action alleged in the complaint herein, were finally distributed to Kate May Dillon and Mary Ives Crocker.

That thereafter the said Kate May Dillon and Mary Ives Crocker were duly substituted as the plaintiffs in said action.

IX.

That the defendant at the commencement of this action
10 was in the possession of the south ½ of the southeast ¼, and the southwest ¼ of section 21, of township 7 south, range 3 west, Mount Diablo meridian, being 240 acres of the land described in the complaint, and of no more of said land. That no part of said lands are or were mineral lands, or were returned or denominated as mineral lands.

X.

That the rents and profits of said land so possessed by the defendant have been, since the deed of conveyance to Chas. McLaughlin, the plaintiff, of the value of one dollar ($1) per acre per annum.

XI.

That in the year 1864, and until December 6, 1866, one Philip Hirleman occupied the land in controversy. He had on the said land during said time a house, barn, corrals and a small field of wheat and potatoes, and cows and horses. Hirleman was there all the time; had possession of about 1,000 acres of land, including the land in controversy, which was inclosed by two fences and two gulches; each fence at each end thereof connecting with the gulches: the gulches and fences constituting an inclosure of the tract of about 1,000 acres, including the land in controversy.
11 The fences ran east and west; the northerly fence was between a half a mile to a mile in length, and ran partly across section 21, and the south fence was upon a section lying south of section 21. Said land was settled and improved as early as 1858 by said Hirleman, and was then used for pasturage; had a house upon it, and was inclosed partly by a post-and-rail fence, and for the balance by gulches forming a natural inclosure.

That on January 30, 1865, the said Hirleman was, and had been prior thereto, and during the year 1864, and was, subsequent to the said 30th day of January, 1864, up to the time of the execution by him of the deed to Jean Peter, a settler in good faith on the land involved in this action, to wit: said 240 acres; and that the im-

provements hereinabove designated were made on the said land by him in good faith, and that such settlement by him, and the said improvements, were made with the intention in good faith of taking, at the proper time, the necessary steps to acquire the title to said land from the Government of the U. S., by procuring its location in part satisfaction of the grant made by the Government of the U. S. to the State of California of 500,000 acres of land, by act of Congress of date —— —; and then of purchasing the land involved in this action from the State of California.

12 That during the said years 1864 and 1865, the said Hirleman was a duly naturalized citizen of the U. S., and was then and had been since 1858, a resident in good faith of the State of California, and the county of Santa Cruz, in which county the land involved in this action was then located, and was the head of a family, and possessed of all the qualifications necessary to enable him to acquire the title from the Government of the United States to the land in controversy in this action, in the manner hereinabove stated.

XII.

That under and by virtue of the act of the legislature of the State of California of April 27th, 1863, entitled "An act to provide for the sale of certain lands belonging to the State of California," and on June 13th, 1864, said Hirleman, in due and proper form, made application to Leander Ransom, who was then and there the duly appointed, qualified and acting locating agent of the State of California, under said act, to locate as a lieu school land location, and to purchase from said State, the said 240 acres of land involved in this action; which said application was accompanied with the affidavit of said applicant, in due and proper form, required by the act of April 27th, 1863, and also with the affidavit of

13 loyalty, in due and proper form, required by the act of April 27th, 1863, and also the affidavits of three disinterested witnesses as to the character of said land, and the fact that no valid claim existed thereto adverse to said applicant's claim, as required by said act of April 27th, 1863; and that said locating agent, on June 16th, 1864, duly accepted said application and affidavits and offer to purchase, upon the condition that if said location should be made and approved by the United States, it should be for the use and benefit of said applicant, upon his complying with all the conditions and provisions of said act of April 27th, 1863; and that said locating agent, on February 28th, 1865, in conformity with the provisions of said act, located in lieu of a portion of the lands of said State, which had been lost to said State, the said 240 acres of land involved in this action, at the request, and for the use of said Hirleman, by filing an application for the same in the name and for the State of California, in the United States land office at San Francisco, said land being within the San Francisco land district, with the consent of John F. Swift, who was then the duly appointed, qualified and acting register of said district; which said location made upon said Hirleman's application was filed in the State land

office of the State of California, on April 4, 1865, and was, by
14 the surveyor general of said State, approved May 13th, 1865; and that the treasurer of Santa Cruz county, within which county said land was then included, was, in the said order of approval, directed to receive in payment of said location, within fifty days from the recording of said approval, twenty per cent. of the purchase-money and one year's interest on the balance in advance, at the rate of ten per cent. per annum, from the date of the location in the locating agent's office.

XIII.

That on the fourth day of June, 1865, payment was made to the treasurer of Santa Cruz county, where said land was situated, by said Hirleman, that is to say, within said fifty days after the recording of said approval of location of said Hirleman, made June —, 1864, in all respects as directed, as above stated; and on the thirty-first day of August, 1865, a certificate of purchase, in due from, covering said land, was issued to him, by the State of California, upon said application.

XIV.

That on the sixth day of December, 1886, said Hirleman conveyed, by deed of conveyance, all his right, title and interest in and to said 240 acres of said land to said Jean Peter, who there-
15 upon took and held possession of said lands until the ninth day of March, 1867, when he conveyed, by deed of conveyance, all his right, title and interest in and to said land, to said defendant, Menotti. That said Menotti thereupon entered into the possession of said lands, and ever since has been and still is in the possession thereof, occupying the same.

XV.

That after the twenty-third day of July, 1866, to wit: about the thirteenth day of March, 1872, the defendant made application to the proper officers of the United States land department for a confirmation of the right of said State to said land so selected by said State for his benefit, under the provisions of the act of Congress, entitled "An act to quiet land title in California," approved July 23d, 1866; and thereupon and upon due notice to said Western Pacific Railroad Company and the parties claiming under it, such proceedings were regularly had in said department and such proofs submitted, and such a hearing in said department had that on the fifteenth day of May, 1874, the Commissioner of the General Land Office, under the direction and with the approval of the Secretary of the Interior, listed over and certified to said State, the 240 acres of land as confirmed to said State of California.

16 XVI.

That on the thirty-first day of December, 1874, full payment upon said location was made to said State of California, through the

proper county treasurer, by said defendant as assignee of said Hirleman.

That on the twenty-fifth day of February, 1875, said State of California issued to this defendant, as assignee of said Hirleman as aforesaid, its letters patent, in due form, granting said 240 acres of land to said defendant upon said application above mentioned.

Conclusions of Law.

From the foregoing facts the court draws the following conclusions of law:

I.

That the 240 acres of land involved in this action did not pass to the grantor of said Chas. McLaughlin, to wit: the railroad company, by virtue of either the act of Congress of July 1st, 1862, or the act of Congress of July 2d, 1864.

That on the date of the order of withdrawal of January 30th, 1865, made by the Secretary of the Interior, the grantor of the defendant, Philip Hirleman, had a lawful claim, and was a *bona*
17 *fide* settler, and had made improvements in good faith upon the said 240 acres of land, within the meaning of the act of Congress of July 2d, 1864.

II.

That at the commencement of this action defendant was, he has been, and is now, the owner, and entitled to the posession, of said 240 acres of land.

Judgment is ordered to be entered in favor of the defendant accordingly, and for his costs.

Dated San Francisco, Sept. 7th, 1892.

JNO. F. FINN, *Judge.*

(Endorsed:) (Title of court and cause.) Filed September 7th, 1892. Wm. J. Blattner, clerk, by R. V. Croskey, deputy clerk.

Judgment.

(Title of Court and Cause.)

This cause came on before the above-named court, presided over by the Honorable J. F. Finn, judge. The plaintiffs, hereinafter named, were represented by A. L. Rhodes, Esq., as their
18 counsel, and the defendant by Jackson Hatch, Esq., as his counsel. A jury was especially waived by the parties. It was made to appear to the court that since the commencement of this action the plaintiff, Charles McLaughlin, had died; that his estate had been duly administered upon, and had been finally distributed to Kate May Dillon and Mary Ives Crocker, and that they had been, by an order of the court, duly given and made, substituted as, and that they were at the time of said trial, the plaintiffs in said action;

and it appears that they have since been and are still such plaintiffs therein.

Thereupon evidence, both documentary and oral, was offered and introduced by the respective parties in support of their respective claims. The evidence was then closed. The cause was then argued before the court by counsel for the respective parties. The cause was then submitted to the court for its decision. Thereafter, upon due consideration, the court duly gave and made its decision, findings of fact and conclusions of law, in writing, in favor of the defendant and against the plaintiffs, and caused the same to be filed.

Wherefore, by reason of the law and the premises, it is
19 hereby ordered and adjudged that neither the said Kate May Dillion nor said Mary Ives Crocker, the successors in interest of the plaintiff named in this action, nor any other person claiming under the said plaintiffs, shall have or take anything by reason of this action; and that the defendant, Peter Menotti, do have and recover of and from the said Kate May Dillion and Mary Ives Crocker, the plaintiffs herein, his costs, hereby taxed at the sum of — dollars.

Dated September 7th, 1892.

JOHN F. FINN, *Judge.*

Recorded Dec. 24th, 1892, B. 18, p. 78.

(Endorsed:) (Title of court and cause.) Filed September 12, 1892. Wm. J. Blattner, clerk, by R. V. Croskey, deputy clerk.

Notice of Appeal.

(Title of Court and Cause.)

You will please take notice and you are hereby notified that the plaintiffs, Kate May Dillon and Mary Ives Crocker, in the above-entitled action, hereby appeal to the supreme court of the
20 State of California, from the judgment therein rendered, and which was entered in said superior court, on the 24th day of December, 1892, in favor of the defendant in said action, and against said plaintiffs, and from the whole thereof.

Dated this 31st day of December, 1892.

Yours, etc.,

A. L. RHODES,
Attorney for Plaintiffs.

To Jackson Hatch, attorney for defendant.

(Endorsed:) (Title of court and cause.) Service of the within notice by copy thereof this the 31st day of December, 1892, hereby admitted. Jackson Hatch, attorney for defendant. Filed January 3d, 1893. Wm. J. Blattner, clerk, by G. R. Butler, deputy.

Waiver of Undertaking on Appeal.

(Title of Court and Cause.)

Mary Ives Crocker and Kate May Dillon, who have been
21 duly substituted as the plaintiffs in the above-entitled action, having served and filed a notice of appeal to the supreme court of said State, from the whole of the judgment rendered in said action against them, and in favor of said defendant, said judgment having been entered on the 24th day of December, 1882, the said defendant does hereby waive the making and filing of any undertaking on appeal in said cause.

Dated January 3d, 1893.

JACKSON HATCH,
Attorney for Defendant.

(Endorsed:) (Title of court and cause.) Filed January 3d, 1893. Wm. J. Blattner, clerk, by G. R. Butler, deputy clerk.

Stipulation.

(Title of Court and Cause.)

It is hereby stipulated that the foregoing are full, true and correct copies of the original papers on file in said cause, and that the same shall constitute the transcript of the record on the ap-
22 peal from said court to the supreme court from the aforesaid judgment; and that an undertaking on appeal has been duly waived.

January 25th, 1893.

A. L. RHODES,
Attorney for Plaintiffs.
JACKSON HATCH,
Attorney for Defendant.

23 In the Supreme Court of the State of California.

CHARLES MCLAUGHLIN, Appellant,
v.
PETER MENOTTI, Respondent. } No. 15299.

I do hereby acknowledge due service upon me of a copy of the transcript of the record on appeal in the above-entitled action on this the 25th day of January, 1893.

JACKSON HATCH,
Attorney for Respondent.

24 Filed Jan. 6, 1895.

Appeal from superior court of San Francisco Co.—John F. Finn, J.

For app't, A. L. Rhodes.
For resp't, Jackson Hatch.

In Bank.

McLaughlin, Appellant, *vs* Menotti, Respondent. } No. 15299.

By the Court:

Upon the former appeal in this case (89 Cal., 354) the case was remanded for a new trial, for failure of the trial court to find whether Hirleman, the predecessor of the defendant, was a *bona fide* settler upon the lands involved in the action, within the meaning of section 4 of the act of Congress of July 2, 1864 (13 U. S. Stat., p. 358), amending the act of July 1, 1862. That section, so far as applicable to the present case, as found in the printed volume of the statutes, reads as follows: "And any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp land, or other lawful claim, nor include any Government reservation, or mineral lands, or the improvements of any *bona fide* settler, or any lands returned and denominated as mineral lands, and the timber necessary to support his said improvements as a miner, or agriculturist, etc.;" and this court in its opinion upon the former appeal assumed this reading to be correct. Upon the subsequent trial of the cause the superior court found that Hirleman was a *bona fide* settler, within the meaning of the act of Congress, and rendered judgment in favor of the defendant. The plaintiffs have appealed from this judgment upon the findings alone.

Counsel for appellants has now produced a copy of the enrolled act on file in the Department of State at Washington, under the seal of the department, and certified by the Secretary of State, from which it appears that the true reading of the foregoing portion of the statute is as follows: "And any lands granted by this act or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp land, or other lawful claim, nor include any Government reservation or mineral lands, or the improvements of any *bona fide* settler on any lands returned and denominated as mineral lands, and the timber necessary to support his said improvements as a miner, or agriculturist, etc."

We must accept this certified copy of the act as the authentic statute and expression of the legislative will. What are the provisions of a statute is a question of law to be determined by the court upon an examination of the statute itself, and the enrolled copy of the act is the statute or legislative will, by which courts are to be governed. If there is any variance between an act, as found in the printed volume of statutes, and the original, as enrolled and deposited with the secretary of state, the latter must prevail. Sec-

tion 1875 (3), C. C. P., provides that the courts of this State shall take judicial knowledge of public acts of the legislative department of the United States; and declares that "the court may resort for its aid to appropriate books or documents of reference." In the absence of the original act, a copy, certified by its legal custodian to be correct, must be accepted as the highest proof of its terms. It is worthy of note that in two cases in which the statute under consideration has been before the Supreme Court of the United States it is quoted in their opinion in the terms found in the foregoing copy, as certified by the secretary of state; Broder *vs.* Water Co., 101 U. S., 276; Kansas R. R. Co. *vs.* Dunmeyer, 113 U. S., 635; thus furnishing persuasive evidence that the error in the printed volume had been previously called to the attention of that court.

As the court has found "that no part of said lands are or were mineral lands, or were returned or denominated as mineral lands," its finding that Hirleman was a *bona fide* settler is immaterial, since it is only the improvements of a *bona fide* settler on such lands that are referred to in the act; and, as the other questions presented in the action were determined upon the former appeal in favor of the present appellants, we are required to reverse the judgment and direct that a judgment be entered upon the findings in favor of the appellants.

The judgment is reversed, and the superior court is directed to enter a judgment in favor of the appellants for the recovery of the lands described in the findings, and for the amount of rents and profits therein found.

We dissent.
BEATTY, *C. J.*
DE HAVEN, *J.*

Filed Feb. 6, 1895.

Appeal from superior court of San Francisco Co.—John F. Finn, J.

For app't, A. L. Rhodes.
For resp't, Jackson Hatch.

In Bank.

McLAUGHLIN *vs.* MENOTTI. } No. 15299.

By the COURT:

The judgment herein is modified by the addition thereto of the following words: Not exceeding the amount stated in the complaint.

Rehearing denied.

BEATTY, *C. J.*
HARRISON, *J.*
TEMPLE, *J.*
GAROUTTE, *J.*

25 (Copy.)

In the Supreme Court of the State of California. In Bank.

CHARLES McLAUGHLIN, Appellant,
vs.
PETER MENOTTI, Respondent. } No. 15299.

On appeal from the superior court in and for the city and county of San Francisco.

And now, at this day, this cause being called and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the court herein is delivered by the court.

We dissent.
BEATTY, *C. J.*
DE HAVEN, *J.*

Whereupon it is adjudged and decreed by the court that the judgment of the superior court in and for the city and county of San Francisco in the above-entitled cause be, and the same is hereby, reversed, and the superior court is directed to enter a judgment in favor of the appellants for the recovery of the lands described in the findings and for the amount of rents and profits therein found, not exceeding the amount stated in the complaint, appellant to recover costs of appeal herein.

I, T. H. Ward, clerk of the supreme court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment, modified, entered in the above-entitled cause on the 6th day of February, 1895, and now remaining of record in my office.

Witness my hand and the seal of the court, affixed at my office, this 9th day of March, A. D. 1895.

[SEAL.]

T. H. WARD, *Clerk*,
By A. W. JOHNSON, *Deputy*.

26 [Endorsed:] (Copy.) No. 15299. In the supreme court, State of California. Remittitur. McLaughlin *vs.* Menotti.

Clerk's costs		$
Paid by appellant	$15 00	
Paid by respondent	5 00	
Total		$20 00

T. H. Ward, clerk, by A. W. Johnson, deputy.

27 In the Supreme Court of the State of California.

KATE MAY DILLON and MARY IVES CROCKER, Substituted as Plaintiffs and Appellants in Place of Charkes McLaughlin, Deceased, Plaintiffs,

vs.

PETER MENOTTI, Defendants.

Whereas the defendant above named, the plaintiff in error herein, is about to apply to the chief justice of the supreme court of the State of California for an order allowing him to prosecute a writ of error to the Supreme Court of the United States from the judgment and decision of the supreme court of the State of California made and entered on the 6th day of January, 1894, against him and in favor of the plaintiffs above named, the defendants in error herein:

Now, therefore, we, the undersigned, Peter Menotti, said plaintiff in error, as principal, and Andrea Manfredi and M. J. Scarpa, as sureties, being residents and householders of the county of Santa Clara, in the State of California, do hereby, jointly and severally, undertake and promise to the effect that if said writ be allowed the plaintiff in error, Peter Menotti, shall prosecute his writ of error to effect in the Supreme Court of the United States, and that if he fail to make his plea good he shall answer all costs not exceeding the sum of $500.

PETER MENOTTI.
ANDREA MANFREDI.
M. J. SCARPA.

STATE OF CALIFORNIA, *County of Santa Clara,* } *ss.*:

Andrea Manfredi and M. J. Scarpa, being first duly sworn, each for himself says that he is a householder and resident of the county of Santa Clara, State of California, and is worth the sum of $500 over and above all his just debts and liabilities, exclusive of property exempt from execution.

ANDREA MANFREDI.
M. J. SCARPA.

Subscribed and sworn to before me this 7th day of June, 1895.

B. E. BURNS,
[SEAL.] *Notary Public for Santa Clara County, California.*

Endorsed: Filed June 26th, 1895. T. H. Ward, clerk, by A. W. Johnson, deputy.

28 UNITED STATES OF AMERICA:

To Kate May Dillon and Mary Ives Crocker, defendants in error:

You are cited to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the 9th day of August, A. D. 1895, pursuant to a writ of error filed in the office of the clerk of the supreme court of

the State of California, wherein Peter Menotti is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. H. Beatty, chief justice of the supreme court of the State of California, this 25th day of June, A. D. 1895, and of the Independence of the United States the one hundre-*th* and nineteenth.

[Seal Supreme Court of California.]

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

Attest: T. H. WARD,
Clerk of the Supreme Court of Cal.

29 [Endorsed:] 15299. Supreme court of California. Peter Menotti, pl't'ff in error, *v.* Kate May Dillon *et al.*, def'd'ts in errors. Citation. Personal service of the within citation is admitted June 25th, 1895. Augustus L. Rhodes, attorneys for defendants in error. Filed Jun- 26, 1895. T. H. Ward, clerk, by A. W. Johnson, deputy.

30 In the Supreme Court of the State of California.

KATE MAY DILLON and MARY IVES CROCKER, Substituted as Plaintiffs and Appellants in Place of Charles McLaughlin, Deceased, Plaintiffs,

vs.

PETER MENOTTI, Defendant.

Petition for Allowance of Writ of Error.

To the honorable the justices of the supreme court of the State of California:

Peter Menotti, the defendant in the above-entitled action and the plaintiff in error herein, respectfully represents to your honors as follows:

I.

That an action was commenced against him by Charles McLaughlin, as the plaintiff, in the district court of the third judicial district of the State of California in and for the city and county of San Francisco, on January 4th, 1875, for the recovery of the possession of the south half of section 21, township 7 south, range 3 west, Mount Diablo meridian, and for $1,000, the value of the rents, issues, and profits of said land, the complaint being in the usual form of action in ejectment.

An answer consisting of a general denial was filed by the defendant Menotti October 14th, 1875.

The cause was thereafter tried before Judge Thornton in the dis-

trict court above named and judgment was entered February 16th, 1881, denying plaintiff any relief and awarding defendant his costs.

Plaintiff moved for a new trial; which motion was denied. He then appealed to the supreme court of California from the
31 judgment and order denying his motion for a new trial.

His appeal from the judgment was dismissed, and the order denying him a new trial was reversed May 30th, 1891, and the cause remanded for a new trial. The decision is reported in 89 California Reports, 354.

Thereafter the cause was tried before Judge Finn, and judgment was entered December 24th, 1892, in favor of Menotti and against the successors in interest of McLaughlin, who in the meantime had died, and successors being Kate May Dillon and Mary Ives Crocker.

An appeal was taken from this judgment to the supreme court of California December 31st, 1892, and thereafter, on the 6th day of January, 1895, said supreme court reversed the judgment appealed from, directing the lower court to enter judgment on the findings in favor of the plaintiffs and against the defendant Menotti for the possession of a part of the land, to wit, .240 acres, and certain rents and profits.

That said decision has become final.

II.

That in said action and proceeding there was drawn in question the construction of a statute of the United States, to wit, section 4 of the Pacific Railroad act of July 2nd, 1864 (13 Stat. U. S., p. 361), and the decision of the said supreme court was against the title, right, and privileges especially set up and claimed under such statute by the plaintiff in error, the defendant in that suit, his claim of ownership of the land there involved being based upon the statute hereinabove referred to.

And the defendant in said action, being the plaintiff in error herein, being dissatisfied with the judgment made and entered in said action in said supreme court reversing the said judgment of the superior court, and feeling himself aggrieved thereby and by the action of said supreme court in directing the entry of judgment against him and in favor of the plaintiff therein, and that said judgment should have been in his favor, and that it is contrary to law, now comes by his attorney, Jackson Hatch, and petitions this honorable court for an order allowing said plaintiff in error to prosecute a writ of error to the honorable the Supreme Court
32 of the United States, under and in accordance with the laws of the United States in that behalf made and provided.

And also that an order be made fixing the amount of security which plaintiff in error shall give and furnish on said writ; that he will prosecute his writ to effect, and that if he fail to make his plea good he shall answer all costs.

And your petitioner, as in duty bound, will ever pray.

JACKSON HATCH,
Attorney for Plaintiff in Error.

(Endorsed:) Filed Jun- 26, 1895. T. H. Ward, clerk, by A. W. Johnson, deputy.

33 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the justices of the supreme court of the State of California, United States of America, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court, before you between Peter Menotti, respondent, plaintiff in error, and Kate May Dillon and Mary Ives Crocker, substituted as plaintiffs and appellants in place of Charles McLaughlin, deceased, defendants in error, a manifest error hath happened, to the great damage of the said Peter Menotti, plaintiff in error, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you have the same at the city of Washington, District of Columbia, on the 9th day of August next, in the said Supreme Court of the United States to be there and then held, that, the record and proceedings aforesaid beinspected, the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 10th day of June, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the United States the one hundred and nineteenth.

Seal U. S. Circuit Court, Northern Dist. Cal.

W. J. COSTIGAN,
Clerk of the Circuit — of the United States, 9th Judicial Circuit, Northern District of California.

The above writ of error is hereby allowed.

W. H. BEATTY,
Chief Justice of the Supreme Court of California.

34 [Endorsed:] United States ——. —— —— *vs.* —— ——. Writ of error. Filed Jun- 26, 1895. T. H. Ward, clerk, by A. W. Johnson, deputy.

35 In the Supreme Court of the State of California.

KATE MAY DILLON and MARY IVES CROCKER, Substituted as Plaintiffs and Appellants in Place of Charles McLaughlin, Deceased, Plaintiffs,

vs.

PETER MENOTTI, Defendant.

Order Allowing Writ of Error.

Peter Menotti, the defendant above named, as plaintiff in error, having presented to this court his petition that he be allowed to prosecute a writ of error to the honorable the Supreme Court of the United States from the decision and judgment of this court to the judgment of the court wherein said cause was tried and which judgment was given and made on the sixth day of January, 1895—

And it appearing to this court that said petition ought to be granted:

Now, therefor-, it is ordered that a writ of error herein be, and it is hereby, allowed, and that the plaintiff in error give good and sufficient security that he will prosecute his writ to good effect, and that if he fail to make his plea good he shall answer all costs, and said security to be approved by this court in the sum of five hundred dollars ($500).

Dated this 13th day of June, 1895.

W. H. BEATTY,

Chief Justice of the Supreme Court of the State of California.

(Endorsed:) Filed Jun- 26, 1895. T. H. Ward, clerk, by A. W. Johnson, deputy.

36 In the Supreme Court of the State of California.

KATE MAY DILLON and MARY IVES CROCKER, Substituted as Plaintiffs and Appellants in Place of Charles McLaughlin, Deceased, Plaintiffs,

vs.

PETER MENOTTI, Defendant.

Assignment of Errors.

The defendant above named, having petitioned the said court for an order permitting him to prosecute a writ of error to the honorable the Supreme Court of the United States from the judgment made and entered in said court, now makes and files with the said petition the following, and specifies the same as his assignment of errors herein and upon which he will rely for a reversal of said judgment upon said writ:

I.

Phillip Hirleman, from whom the plaintiff in error derived his title to the land involved in this action, had a lawful claim to the

land in controversy on January 30th, 1865, within the meaning and intent of that portion of section 4 of the act of Congress of the United States passed July 2nd, 1864, which reads as follows:

"Any land granted by this act * * * shall not defeat or impair any pre-emption, homestead, swamp land, or other lawful claim, nor include any Government reservation or mineral lands or the improvements of any *bona fide* settler on any lands returned and denominated as mineral lands;" and the said supreme court erred in deciding and adjudging that said Hirelman did not have such lawful claim to said land on the date above specified.

II.

The findings of the trial court show that on the day mentioned, January 30th, 1865, which was the day the Secretary of the Interior caused to be reserved odd sections of land within the grant to the Western Pacific Railroad Company, said Hirleman was in possession of the land in controversy, and that his entry thereof had been made long prior to said date and in good faith, and was accompanied by improvements made by him in good faith, and that his settlements thereon and improvements were made with the intention and in good faith of taking at the proper time the necessary steps to acquire the title to said land from the Government of the United States by procuring its location in part satisfaction of the grant made by the United States Government to the State of California of 500,000 acres of land, and then of purchasing the land involved from the State of California, and that his claim to the land, arising from such settlement, was in every sense lawful and was one of a class of claims recognized by the act of Congress before referred to, and was reserved from the operation of the grant to the railroad company above mentioned; and the said supreme court erred in deciding in its said judgment against this claim of title and right thus set up by the plaintiff in error in the said cause.

37 Therefore, by reason of the foregoing assignment of errors and the petition of the plaintiff in error herein for leave to prosecute a writ of error herein to the Supreme Court of the United States, the plaintiff in error submits its said petition in error and this assignment of errors, and prays for an order of this honorable court allowing him to prosecute such writ of error to the said Supreme Court of the United States.

Dated this — day of ——, 1895.

JACKSON HATCH,
Attorney for Plaintiff in Error.

(Endorsed:) Filed Jun- 26, 1895. T. H. Ward, clerk, by A. W. Johnson, deputy.

38 I, T. H. Ward, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed pages, from 1 to 34, inclusive, constitute a full, true, and correct copy of the record in the action therein named, McLaughlin *vs.*

Menotti, No. 15299, and of the assignment of errors and of all proceedings in the case, and also the original writ of error and the original citation, with all endorsements thereon, and that the same together constitute the return to said writ of error.

Witness my hand and the seal of said supreme court of the State of California this 26th day of June, 1895.

[Seal Supreme Court of California.]

T. H. WARD, *Clerk*,
By A. W. JOHNSON, *Deputy*.

Endorsed on cover: Case No. 15,973. California supreme court. Term No., 309. Peter Menotti, plaintiff in error, *vs.* Kate May Dillon and Mary Ives Crocker. Filed July 31, 1895.

FILED
MAR 19 1897
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 309.

PETER MENOTTI, PLAINTIFF IN ERROR,

vs.

KATE MAY DILLON, AND
MARY IVES CROCKER, DEFENDANTS IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

S. F. LEIB,
Attorney for Plaintiff in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 309.

PETER MENOTTI, PLAINTIFF IN ERROR,

vs.

KATE MAY DILLON, AND
MARY IVES CROCKER, DEFENDANTS IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

I.

A Statement of the Case.

This action was ejectment. The cause was heard before the trial Court without a jury. Findings of fact and conclusions of law were duly filed, and a judgment was thereupon entered in favor of the defendant, the plaintiff in error here.

An appeal from this judgment was prosecuted to the Supreme Court of California by the defendants in error here. On January 6th, 1895, the Supreme Court of California reversed the judgment appealed from, and directed the trial Court to enter judgment on the findings in favor of the defendants in error here, and against the plaintiff in error, Menotti, for the possession of a portion of the land involved in the action, which judgment was accordingly entered.

The decision of the Supreme Court of California is reported

in Vol. 105 Cal. Reports, page 572. The opinion of that Supreme Court was dissented from by the Chief Justice of the Court, and Mr. Justice De Haven, one of the Associate Justices.

The land involved in the action was patented by the Government to the Central Pacific Railroad Co. as the successor of the Western Pacific Railroad Co. on April 3, 1872. The title of the defendants in error here is deraigned from the railroad company. The patent mentioned issued to the company under the provisions of the Pacific Railroad Acts of 1862-64, the grants of land having been made by Congress to the Western Pacific Railroad Co. A copy of the map designating the general route of the road was filed in the San Francisco Land Office on January 30th, 1865, and was accompanied by an order from the Secretary of the Interior to the Register and Receiver reserving from pre-emption, private entry and sale the odd numbered sections of land within twenty-five miles on either side of the general route of said road.

The line of the road was definitely located on February 20th, 1870, but the railroad itself had been completed by September 1st, 1866, between San Jose and Niles, being the portion opposite the land in controversy.

The official map of the township embracing the land here involved was filed in the United States Land Office at San Francisco on February 27th, 1865.

One Philip Hirleman made a settlement upon the land here involved in 1858, and inaugurated proceedings in 1864 for the purchase of this land from the State of California. These proceedings were commenced on June 13th, 1864, by the filing of *an application* by Hirleman to the State Locating Agent under the State Act of April 27th, 1863, (Statutes of California, 1863, page 591,) and ultimated in the issuance of a patent by the State to Menotti, the plaintiff in error, who had meantime succeeded to Hirleman's interest in the land, as well as his occupation thereof. The land was applied for in lieu of certain school land to which the State became entitled under the 500,000-acre donation.

Prior to June 13th, 1864, Hirleman filed his application as above mentioned. The land had not been surveyed by authority of the Government, but a survey had in fact been made by a Deputy United States Surveyor for California of the portion of the township embracing the land involved in this action. No actual survey of any portion of that township had ever been made before June, 1864, and no attempt had up to that time been made by any person or by the Government to have the boundaries of that township ascertained or any of the section lines therein laid out.

The trial Court found a substantial compliance by Hirleman with the provisions of the State Act of April 27th, 1863, and a recognition by the State as well as by the Federal authorities of the proceedings leading up to the issuance of the patent. Hirleman made his application in due and proper form, the application was accepted, the 240-acre tract applied for was duly located by the Locating Agent for Hirleman's use. The application therefor in the name of the State of California was filed in the United States Land Office at San Francisco. Due proceedings were then taken in the proper land department of the State of California, due payment was made by Hirleman for the land as required by the laws of the State, and also by Menotti, and in March, 1872, Menotti made application to the officers of the United States Land Department for the confirmation of the right of the State to the land so selected by the State for his benefit under the provisions of "An Act to Quiet Land Title in California," passed by Congress and approved January 23, 1866. After a hearing in the Land Department had upon notice to the railroad company, in May, 1874, the Commissioner of the General Land Office, with the approval of the Secretary of the Interior, listed over and certified to the State the 240 acres of land mentioned as confirmed to the State. Full payment upon the location having been made in December, 1874, to the State by Menotti, as the successor in interest of Hirleman, the State issued its patent as above mentioned to him, covering the land in question.

The trial Court also found that on January 30th, 1865,

which was the day upon which a copy of the map of the general route of the railroad filed in the office of the Secretary of the Interior was received at the United States Land Office at San Francisco, together with an order from the Secretary of the Interior to the Register and Receiver in said office reserving from pre-emption, private entry and sale the odd numbered sections of land within the limits of the railroad grant, said Hirleman was, and had been prior thereto and during the year 1864, and was subsequent to said January 30th, 1864, and until he conveyed his interest in the land to another, a settler in good faith on the land, and that the improvements found by the Court to have been made by him on the land were made by him in good faith, and that such settlement by him and the improvements were made with the intention in good faith of taking at the proper time the necessary steps to acquire the title to said land from the United States Government by procuring its location in part satisfaction of the grant made by the Government of the United States to the State of California of 500,000 acres of land, and then of purchasing the land involved in this action from the State of California, and that during the times mentioned Hirleman was a duly naturalized citizen of the United States and possessed all of the qualifications necessary to enable him to acquire from the United States Government the title to the land in controversy in this action in the manner above stated.

All of the foregoing facts are drawn from the findings of the trial Court, appearing in the transcript of the record in this case, commencing with folio 6 and ending with folio 17.

II.

Specifications of the Errors Relied Upon.

In this Court the plaintiff in error relies upon the following errors, to-wit:

1.—The refusal of the Supreme Court of California to decide that Philip Hirleman, the predecessor in interest of Peter Menotti, the plaintiff in error here, held and possessed a *lawful*

claim to the land in controversy at the time of the withdrawal from pre-emption, private entry and sale of the odd numbered sections of land within the limits of the railroad grant, and that his claim to the same was, therefore, within the class of claims not affected by the railroad grant made by the Pacific Railroad Act of July 2d, 1864.

2.—That at the time mentioned said Philip Hirleman was a *bona fide settler on the land involved, and had improvements as such thereon*, and therefore was entitled to hold his land, notwithstanding the railroad grant, under the same provision of the Pacific Railroad Act of July 2d, 1864.

III.

The Argument of the Plaintiff in Error.

1.

Section 4 of the Act of Congress of July 2d, 1864, provided certain exceptions from the operation of the Pacific Railroad grant which were more comprehensive than those to be found in the Pacific Railroad Act of July 1st, 1862.

The particular clause of the Act of July 2d, 1864, upon which the contentions of the plaintiff in error are based, is as follows:

"Any land granted by this Act, or the Act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp land or other lawful claim, nor include any Government reservation or mineral lands, or the improvements of any *bona fide* settler, or any lands returned and denominated as mineral lands." (13th U. S. Statutes, 361.)

This grant by its terms did not defeat nor impair either (1) any pre-emption claim, (2) any homestead claim, (3) any swamp land claim, (4) any *other lawful claim*, (5) any Government reservation, (6) any mineral lands, (7) the improvements of any *bona fide* settler, (8) any lands returned and denominated as mineral lands.

The immediate clause under discussion now is the fourth in the above summary, to-wit: "Other lawful claim."

These land grants have been generally quite strictly con-

strued against the grantees. As was said in Leavenworth R. R. Co., 92 U. S. 733: "What is not given expressly or by necessary implication is withheld. What is included in the exception is excluded from the grant, and it therefore becomes important to ascertain what was excepted in order to determine what was granted."

The contention of the plaintiff in error is that his predecessor in interest (Hirleman) had a claim which fell within the clause "other lawful claim."

His entry upon the land, his improvements, his settlement, his application to purchase, his payment to the State—in short, all of his acts, detailed at length in the findings of the trial Court, evidenced two things:

First, his intention and his effort to comply with the conditions necessary to be met in order to invest him with the title to the land from the Government.

Second, the actual filing of his applications and claims, their receipt, acceptance and recognition by the officers of the Government as well as by the officers of the State.

If the expression "other lawful claim" is held to mean a claim inaugurated under some specific law of the United States Government and prosecuted to a successful issue, then it is likely Hirleman's claim did not come within that class; but can so restricted a construction be placed upon this expression?

The Act specially provides for *pre-emption* claims, and *homestead* claims, and *swamp land* claims, and Government *reservations* and *mineral lands*, etc.; therefore, the words "other lawful claims" do not mean any one of them.

A proceeding inaugurated under the State Act was clearly a proceeding in a lawful way, as much so as if it were the filing of a declaratory statement or a homestead declaration. It was the manner which the law pointed out in which a Government title might be acquired by a settler.

The question is, so far as my researches have gone, almost wholly a question of construction, to be determined without the aid of direct authority. I have not been able to find any authority bearing immediately upon the point, except the decision of the Supreme Court of California which is complained

of here, and an earlier decision of the same Court on an earlier appeal, reported in the 89th Vol. of California reports, 363. It affords but little light upon this question, and is not authoritative, because it was given upon a state of facts very different from the facts shown by the findings as they appear in the transcript of the record here.

The opinion in the 89th Cal. 354 deals with a set of facts falling far short of the facts before the Court when the opinion found in Vol. 105 of the Cal. Rep. at p. 572, was written. The proposition that Hirleman had a lawful claim was disposed of in the first opinion of the California Supreme Court very briefly and very unsatisfactorily, and in the opinion in the 105 Cal. Rep., 572, it is stated that the cause was reversed at the former hearing because of the failure of the trial Court to find whether Hirleman was a *bona fide* settler upon the lands involved in the action within the meaning of Section 4 of the Act of Congress of July 2d, 1864. In the latter opinion there is no discussion at all as to the construction of the words "other lawful claim," so that the only direct authority to be found in the opinions of the Court in this case, if it can be called direct, is that in the first opinion, and, as suggested, this is very unsatisfactory and not authoritative, as the facts then before the Court did not really show Hirleman's qualifications to acquire title from the Government.

In this case the land in controversy was at the time the railroad grant took effect affected by something more than a mere pretended claim existing only in the mind of an individual. It was for the time actually segregated from the body of the public domain by claims apparently genuine and lawful, appearing of record and recognized by the officers of the Government.

It has been decided that a pre-emption claim, if it had attached to the land, was sufficient to withdraw the land from the operation of railroad grants, although it turned out subsequently, for instance, that the applicant had never lived on the land, and for that reason the declaratory statement was cancelled.

Whitney vs. Taylor, 45 Fed. Rep. 616.

Certainly the filing of a declaratory statement or homestead is no more solemn an act than the filing of the initial papers in proceedings to acquire a Government title in the manner provided by the State for that purpose.

In this case Hirleman did file his papers, and they were acted upon all along the line. Whether his proceeding was inaugurated correctly, or should have properly eventuated in the issuance to him by the State of its patent, is not any more material to the discussion of the question under consideration than was the question as to what the final outcome of the declaratory statement was in the case of Whitney vs. Taylor, before referred to.

In the opinion of the Supreme Court of California in this case, in 89 Cal., page 363, Mr. Justice De Haven gave a definition of a *bona fide* settler which seems to cover also the words "other lawful claim." The entry upon the land by Hirleman, as before stated, is found to have been made with the intention of meeting the requirements thus suggested by Mr. Justice De Haven as constituting the elements of a settlement in good faith.

In brief, the claim of Hirleman was one of a class of claims recognized by the laws of the United States. It was a meritorious claim and not in any sense unlawful. He was not a mere trespasser on the land.

2.

If, however, it should be held by this Court that Hirleman's was not a lawful claim within the Act of Congress above quoted, it is clear from the findings of fact that he was a *bona fide* settler, and had improvements made in good faith on the land in controversy at the time of the order withdrawing the odd numbered sections within the railroad grant from pre-emption, private entry and sale, took effect.

What has been said heretofore upon the question as to whether Hirleman's claim was lawful, referring to the character of Hirleman's possession, and the steps he took to acquire title to the land, is applicable to the discussion of the question now under consideration, viz: Was Hirleman a *bona fide*

settler upon the land, and did he have improvements thereon in good faith, on January 30th, 1865, within the meaning of Section 4 of the Act of July 2d, 1864?

That Hirleman was in fact a settler upon the land in controversy, and had improvements thereon at the date mentioned, is admitted in this case.

Hirleman's settlement and improvements were made with the intention of making application to purchase the land from the State.

Hirleman's possession of the land, therefore, was not wrongful; it was unquestionably in good faith.

It appears from the findings that an actual survey of the land was made in June, 1864; it was the first survey that had been made; whether it was official or not is immaterial here. It is true that no opportunity was given Hirleman before that time to make an entry of the land either at the United States Land Office or with the State Locating Agent. Within a few days after this survey had been made Hirleman made his application to purchase. Whether this application was void or not does not affect the question of his good faith. Within due time he took what he supposed were the proper steps to acquire title, and in this supposition he was confirmed by the action, not only of the State authorities, but of the Federal authorities as well. They took his money, and as far as they could they ratified everything that he had done.

He was a person qualified not only by the laws of the United States, but by the laws of this State, to acquire the title to the land in question.

Therefore, it cannot be said that Hirleman was not acting in good faith.

Upon this point, it seems to me the opinion in this case of Mr. Justice De Haven, concurred in by Mr. Justice Sharpstein and Mr. Justice Beatty, is conclusive. 89 Cal. 363. I here quote again so much of it as is applicable:

"A *bona fide* settler, within the meaning of Section 4 of the Act of Congress of July 2d, 1864, is one who has made an actual settlement upon public land, intending in good faith to acquire the title thereto from the United States. The words

should be held to apply to any actual settler upon land affected by the Act at the date of the order of withdrawal provided for in Section 7 of the Act, and who had settled thereon and made improvements. with the intention, in good faith, of taking at the proper time the necessary steps to acquire the title of the Government in any of the modes allowed by the laws of the United States, and as thus defined are broad enough to include one who has made a settlement with the intention of procuring its location in part satisfaction of any grant made by the United States, to the State, and then purchasing from the State."

There was nothing inconsistent with the view thus laid down in the prevailing opinion in the case; indeed, the point of the prevailing opinion was, so far as the question now under consideration was concerned, that the fact that Hirleman was a *bona fide* settler, was not found by the Court.

It is, therefore, respectfully urged by the plaintiff in error that the land he claims did not pass to the railroad company under the Act of Congress mentioned, as it was embraced in the reservation clauses found in the Act of July 2d, 1864.

All of which is respectfully submitted.

S. F. LEIB,
Attorney for Plaintiff in Error.

Office Supreme Court, U. S.
FILED.
MAR 18 1897
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 309.

PETER MENOTTI,
Plaintiff in Error,

vs.

KATE MAY DILLON AND MARY IVES CROCKER.

Brief for Defendants in Error.

A. L. RHODES,
Attorney for Defendants in Error.

No. 15973.

Filed ..... *1897.*

15,973.

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 309.

PETER MENOTTI,
Plaintiff in Error,
vs.
KATE MAY DILLON AND
MARY IVES CROCKER.

BRIEF FOR DEFENDANTS IN ERROR.

The action is ejectment, in the form usual in California. The plaintiffs—the defendants in error—deraign title, by a regular chain of title under a patent issued by the United States to the Central Pacific Railroad Company by virtue of the Pacific Railroad Acts. The defendant—the plaintiff in error—attacks that patent collaterally, contending that the lands in controversy were not granted to the Railroad Company, because, as he says, they come within two of the exceptions or reservations mentioned in Section 4, of the Pacific Railroad Act of July 2, 1864.

The lands were granted, we contend, by virtue of the Pacific Railroad Acts of July 1, 1862, and July 2, 1864.—12 U. S., Stat. 1862, p. 489, and 13 U. S., Stat. 1864, p. 356.

They are portions of an odd-numbered section.

They are within twenty miles from the line of definite location of the line of the railroad, and within twenty-five miles from the line of the general route of the railroad.—Record, p. 3, Finding V.

The line of the railroad in question is the portion between the city of Sacramento and the city of San Jose, and which was assigned by the Central Pacific R. R. Co. to the Western Pacific R. R. Co. of Cal. in October, 1864.—Record, p. 2, Find. I.

The map of the general route was filed with the Secretary of the Interior December 8, 1864.—Record, p. 2, Find. II.

The order made by the Secretary of the Interior of withdrawal of the odd-numbered sections within the twenty-five miles limit from pre-empting private entry and sale was filed in the local Land Office January 30, 1865.—Record, p. 2, Find. II.

The road opposite to these lands was completed in September, 1866.—Record, p. 2, Find. II.

The map of definite location of the line of the road was filed January 20, 1870.—Record, p. 2, Find. II.

The two railroad companies consolidated under the name of the Central Pacific R. R. Co. June 22, 1870.—Record, p. 3, Find. III.

The map of the official survey of the township, which includes these lands, was filed in the Local Land Office February 27, 1865.—Record, p. 3, Find. IV.

The lands are not mineral lands, and were not returned or denominated as mineral lands.—Record, p. 4, Find. IX.

Defendant's grantor—Hirleman—had the possession of 1,000 acres, including these lands, as early as 1858, and constructed a house and certain fences upon it. In 1864, and until Dec. 1866, he occupied the lands in controversy.—Record, p. 4 Find. XI.

He made the settlement and improvements with the intent of acquiring the title to the lands, through the State, under the grant by the United States to the State, known as the 500,000 acres grant, made by Section 8, of the Pre-emption Act of Sept. 4, 1841.—Record, p. 5, Find. XI.

He—Hirleman—on June 30, 1864, made application to the State Locating Agent to locate these lands in lieu of a portion of school lands that had been lost to the State; and on February 28, 1865, the State Locating Agent located the lands as such lieu lands by filing an application therefor in the U. S. Local Land Office and in the State Land Office, and receiving the approval of the State Surveyor General.—Record, p. 5, Find. XII.

He thereafter made his first payment to the State, received a certificate of purchase from the State, and on December 6, 1866—the year is erroneously printed as 1886 in Find. XIV—conveyed his right, title and interest in the lands to Jean Peter, who in March, 1867, conveyed the same to defendant Menotti; and on February 25, 1875, the State issued to him its patent for the land.—Record, p. 6-7, Find. XIII to XVI.

In March, 1872 the defendant instituted proceedings in the Land Department of the United States, under the Act of July 23, 1866, to quiet land titles in California—14 U. S. Stats., 218—for the confirmation to the State of the lands attempted to be located by him as aforesaid, and thereupon the Land Department listed the lands to the State.—Record, p. 6, Find. XV.

I.

THE DEFENDANT'S GRANTOR—HIRLEMAN—WAS NOT A *bona fide* SETTLER, WITHIN THE MEANING OF THAT TERM, AS IT IS EMPLOYED IN THE PACIFIC RAILROAD ACT OF JULY 2, 1864.

The second point of the defendant—the plaintiff in error— is that the lands were not granted to the Railroad Company by the Pacific Railroad Act of July 2, 1864, because they were, as he contends, excepted or reserved from the grant, because there were upon the lands on January 30, 1865,—the date of the withdrawal of the odd-numbered sections from pre-emption, private entry and sale,—the improvements of a *bona fide* settler.

The point is based upon a typographical error found in many of the printed copies of Section 4 of that Act. The Superior Court of the State upon each trial of the action was misled by that typographical error; but upon the argument of the cause, on the second appeal, before the Supreme Court of the State, we produced a copy of that section from the enrolled Act, certified by the Secretary of State.

The portion of the section upon which the defendant's point is based is as follows: "Any lands granted by this Act, or the Act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp land, or other lawful claim, nor include any Government reservation or mineral lands, OR THE IMPROVEMENTS OF ANY BONA FIDE SETTLER ON ANY LANDS RETURNED AND DENOMINATED AS MINERAL LANDS, and the timber necessary to support his said improvements as a miner or agriculturist." * * * A portion of this sentence, as it appears in some of the printed copies of the Act, as in 2 Lester's Land Laws, is as follows: "*or mineral lands, or the improvements of any bona fide settler, or any lands returned and denominated as mineral lands.*" * * *

It was found by the Court as a fact that these lands are not mineral lands, and were not returned or denominated as mineral lands,—Record, p. 4, Find. VIII; and we contend, therefore, that the fact that there were improvements upon these lands which had been made by the defendant's predecessor—Hirleman—and that he was a *bona fide* settler upon the lands, either at the time of the passage of the Pacific Railroad Act, or of the filing of the map of the definite location of the line of the road, do not bring the lands within that exception to, or reservation from, the operation of the grant of the lands to railroad company. The improvements referred to in that clause of Section 4, are only such as were made by a settler upon lands returned and denominated as mineral lands. The same sentence of the section mentions a "settler who claims as a

miner." The only settler upon agricultural land who is attempted to be protected, or even recognized by that section of the Act, is one having a pre-emption claim, or a homestead claim, and perhaps one for whom land had been located or selected under the Agricultural College grant mentioned in the last sentence of that section. We contend, therefore, that as these lands are not mineral lands, the fact that there were improvements upon them, does not exclude them from the operation of the land grant.

It is proper to remark that in two out of the many cases in which Section 4 of the Act has been construed,

Broder vs. *Water Co.*, 101 U. S., 276;

Kansas Pacific vs. *Dunmeyer*, 113 U. S., 635;

those words of the section are cited by Mr. Justice Miller, speaking for the Court, and they are as they appear in the enrolled Act.

II.

THE DEFENDANTS' PREDECESSOR WAS NOT A *bona fide* SETTLER WITHIN THE MEANING OF SECTION 4 OF THE PACIFIC RAILROAD ACT OF JULY 2, 1864.

Should the proposition we have just discussed be considered untenable, we would then contend that Hirleman was not a *bona fide* settler upon these lands, within the meaning of that term as employed in Section 4 of the Act. A *bona fide* settler upon the public lands of the United States, is one who lawfully enters and settles upon the lands, by virtue of the provisions of some Act of Congress, and for the purpose of acquiring and securing some right, title, or privilege conferred by that Act or some other Act of Congress. No one is regarded as a *bona fide* settler, unless he possesses the requisite qualifications, in cases where the Act prescribes qualifications, nor unless the lands are open to the acquisition of such right, title or privilege as he intended to acquire, when he made his entry. There is no ground upon which it can be claimed that the term *bona fide* settler can be construed as including those who had attempted to avail themselves of some State statute, purporting to confer the right of entry upon the public lands of the United States—such as the "Possessory Act" of 1852 of California. It may be asserted with entire confidence, that there cannot be found among all the laws of the United States relating to the public lands, an instance in which the term "settler" or "*bona fide* settler" is used in any other sense than as meaning a person who had lawfully entered upon public land for the purpose of acquiring the title to it, under the land laws of the United States. A person cannot be regarded as a *bona fide* settler, who did not enter for the purpose of acquiring the

title from the United States, or who entered upon land to which he could not acquire the title from the United States, under the laws of the United States. This Court said: "And there can be no such thing as good faith in adverse holding, where the party knows that he has no title, and that under the law he can acquire none by occupation."

Deffenback vs. *Hawke*, 115 U. S., 407.

And we further contend that if it can be considered that the term *bona fide* settler was intended to include those who settled upon land, in attempted conformity with any State statute, they would not be regarded as having settled in good faith, unless they conformed to the law in that regard. Hirleman entered upon the land in 1858, and made improvements thereupon, with the intention of acquiring the title from the State under the grant of 500,000 acres of land to the State, by Section 8 of the Pre-emption Act of September 4, 1841.—Record, p. 4, Find. XI. Lands could not be selected or located by the State under that Act, until they had been surveyed by the United States.—See Section 8.

It was so decided in

Terry vs. *Nugerle*, 24 Cal., 609;
Hastings vs. *Devlin*, 40 Cal., 358;
Collins vs. *Bartlett*, 44 Cal., 371.

The township containing these lands was surveyed February 27, 1865,—Record, p. 3, Find. IV—and Hirleman being chargeable with notice of that fact, and knowing that the 500,000 acre grant could not be satisfied out of unsurveyed land, cannot be said to have made his entry or improvements *bona fide*.

Should it be claimed that Hirleman's settlement and improvements bear any relation to his attempted location of the lands as lien school lands, on February 28, 1865, it will be noticed that his proceedings are tainted with illegality, and, therefore, it cannot be said that he was a *bona fide* settler. These lands had been withdrawn for the satisfaction of the land grant on January 30, 1865,—Record, p. 2, Find. II. His application to the State Locating Agent on June 13, 1864, was also illegal and void, and, therefore not *bona fide*, because the land had not then been surveyed by the United States.

It has been held in a number of cases in the State Court—and there are no cases to the contrary—that lands cannot be selected or located as lien school lands until after they have been surveyed by

the United States, and that a selection of lands for that purpose prior to such survey is unauthorized and void.

Finney vs. *Berger*, 50 Cal., 248;
Roaker vs. *Johnson*, 49 Cal., 3;
Mealy vs. *Robertson*, 55 Cal., 396.

These lands, even had they not been withdrawn for the satisfaction of the land grant to the railroad company, were not subject to location as lien school lands, at the time when he made his application therefor to the State Locating Agent, June 13, 1864, and his application was therefore unlawful; and when the application was made for him by the State Locating Agent, the lands had been withdrawn, and the application was illegal and void.

The Court found that Hirleman during the year 1864, and until his deed to Jean Peter, was a *settler in good faith*, that he made his improvements upon the lands, *in good faith*, and intended *in good faith* to acquire the title under the 500,000-acre grant to the State,—Record, p. 4, Find. XI.; but the finding of those qualifying words is of no value or significance. The question as to whether those acts and his intention were done and had in good faith, is to be determined by what he did and by the law applicable thereto. As he could not lawfully locate the lands at the times when he attempted to do so, either under the grant of 500,000 acres or as lien school lands, and as he was chargeable with knowledge of the law in those respects, the statement in the findings that those acts were done by him in good faith, is completely negatived and must be disregarded, for a trespass in good faith has not as yet received recognition by the Courts.

Hirleman, we repeat, did not settle upon the land under any law of the United States, and, therefore, was not a settler within the meaning of Section 4. A settlement not authorized by law cannot be regarded as having been made in good faith, for there cannot be a *bona fide* trespass upon public lands. His attempted entry under the State Statutes, being unlawful and unauthorized, cannot be regarded as having been made in good faith, and, therefore, he was not a *bona fide* settler. And these lands not being mineral lands are not within the meaning of the words of Section 4, relating to the improvements of a *bona fide* settler.

It is perhaps unnecessary to notice the matters stated in Finding XV—Record, p. 6,—and we would only say that long prior to the time when proceedings were initiated in the Land Department by the defendants, under the Act of July 23, 1863, the title to these lands had vested in the Railroad Company; and that after the title

had so vested, the Land Department had no jurisdiction to deal with it.

Moore vs. *Robins*, 96 U. S., 530-2.
U. S. vs. *Schurz*, 102 U. S , 378, 403.
Bicknell vs. *Comstock*, 113 U. S., 151.

And therefore the listing of the lands to the State was, in the language of the Act of Congress of August 3, 1854, 10 U. S., Stats. 346, "perfectly null and void."

III.

Defendants Alleged Other Lawful Claim.

The remaining point of the defendant—the plaintiff in error—is to the effect that the title to these lands did not vest in the Railroad Company by virtue of the provisions of the Pacific Railroad Acts, because, as he contends, they came within the meaning of the words "any other lawful claim," as they are employed in Section 4 of the Pacific Railroad Act of 1864.

That term has not been defined in any case in this Court, nor has the Court found any instance in which lands, which under the general terms of the Act, would have vested in the Railroad Company, are excepted from the land grant because they were subject to "any other lawful claim." The section enumerates the lawful claims that are more frequently met in the sections of the country where the lands granted to the railroads are situated—pre-emption, homestead and swamp land claims—and it is probable that the term was employed in the section, as descriptive of unenumerated claims that might be entitled to the same measure of protection as those that were particularly enumerated.

It is manifest, we contend, that the "any other lawful claim" must, like those which are enumerated, have its origin in a law of the United States, must be initiated and based upon such a law. It is impossible to conceive of a lawful claim to a parcel of the public lands of the United States, which Congress would recognize and protect, which was not initiated under its laws. A prior grant to a railroad company of a portion of the lands situated within limits of the lands granted to this Railroad Company would, doubtless, be regarded as coming within the meaning of "other lawful claim;" but if the first land grant had been made by the State, purporting to grant public lands, it could not be held that such a grant could constitute what Congress intended to recognize as a "lawful claim," without doing violence to the plain meaning of the words of the Act.

A settlement upon public land, however long continued, confers no right as against the Government, and the lands remain subject to the legislation of Congress.

Frisbie vs. *Whitney*, 9 Wall., 187.
Yosemite Case, 15 Wall., 77.

In *Northern Pacific* vs. *Colburn*,—decided November 30, 1896,—Kelly, the remote grantor of the plaintiff, was occupying and cultivating the lands, and the Secretary of the Interior, in a contest in his office, held that such occupation and cultivation of the land created a *claim*, which excepted the land from the operation of the grant to the Railroad Company; but the Court held that a no pre-emption or homestead claim attaches to the land, so as to exclude it from the operation of the grant to the Railroad Company, unless the alleged claim had been entered in the records of the Local Land Office. That is the unmistakable doctrine of *Railroad Co.* vs. *Dunmeyer*, 113 U. S., 629, and of the other cases cited in Colburn's case. The Act granting the lands to the Railroad Company fixed a precise event as the time when the grant attached itself to particular tracts of land, and that was the definite location of the line of the railroad; and this Court, in order to remove all doubt or question as to that event, held that the line was definitively fixed when the map of the line was filed in the office of the Secretary of the Interior, thus making the time a matter of official record, and thus making it certain, though the Act itself did not direct the filing of the map with the Secretary of the Interior.

Van Wyck vs. *Knevals*, 106 U. S., 360.
Kansas Pacific vs. *Dunmeyer*, 113 U. S., 629.
Walden vs. *Knevals*, 114 U. S., 373.

Regarding those cases, and others affirming them, as laying down the correct doctrine—and it is correct for obvious reasons—would it be reasonable to suppose that Congress intended that any class of exceptions to the grant should depend upon the oral testimony of witnesses—upon the uncertain recollection of witnesses, given perhaps after the lapse of a long and an undefinable time subsequent to the filing of the map of definite location of the line of the road? No reason can be assigned for requiring a pre-emption claim, or a homestead claim, relied upon as an exception to the grant to the Railroad Company, to be proven by official entries in the Land Office, that will not be equally applicable to an "other lawful claim." It would seem difficult, if not unreasonable, to suppose that Congress intended to recognize claims to land when

the records of the Land Office furnished no evidence of their existence. A patent for land would be a poor evidence of title could it be overthrown by the oral testimony of witnesses given, it might be years after the issue of the patent.

We will again refer, but only briefly, to the basis of Hirleman's claim. His entry in 1858, and his subsequent occupation and improvements were made with the intent of acquiring title from the State, in part satisfaction of the 500,000 acres grant, and they were made while the land was unsurveyed, and were therefore in manifest violation of the provisions of the Section of the Act of 1841, which made the grant. It is palpable that those acts did not—could not—constitute a *lawful claim*. When he made application to the State Locating Agent to locate the lands as lien school lands, the lands had not been surveyed, and therefore he did not inaugurate a lawful claim, even under State authority, and certainly not under the statutes of the United States. When the State Locating Agent presented to the Register of the local Land Office Hirleman's application to locate the lands as lien school lands, the lands had been withdrawn for the satisfaction of the land grant to the railroad company, and such an attempted location was clearly unlawful under the laws of either the United States or the State. It is immaterial that his intention may have been honest, or that his acts were done—in the language of the findings—in "good faith," for each and all of his acts were contrary to law, and therefore not *bona fide*. It is impossible to regard his claim as a *lawful claim* within the meaning of that term of the fourth Section of the Pacific Railroad Act.

The title to the lands unquestionably vested in the railroad company, unless excepted because of the existence of a lawful claim in Hirleman; and his claim not being a "lawful claim" the judgment should be affirmed.

Respectfully submitted.

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